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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1972

No. 72-727

ALFONSO J. CERVANTES,
Petitioner,

vs.

TIME, INC., and DENNY WALSH,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

PETITIONER'S REPLY BRIEF

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Respondents' opposing brief in No. 72-727 contends that "Contrary to plaintiff's argument (Pet. pp. 16-21), the decisions below do not hold that newsmen have a First Amendment privilege to withhold the identity of their sources." (Res. Br. p. 11). We disagree.

If the decisions below did not create a nontestimonial privilege, then petitioner was denied the discovery provided for by the Rules and such plain error would require summary reversal.

In the courts below, respondents' insistence that the First Amendment conferred upon Walsh a privilege to

withhold the identity of his sources was the major stumbling block from the beginning of this suit. In the District Court petitioner promptly sought to compel disclosure of Walsh's claimed sources. In his appeal he asserted it was error to deny him this discovery. He has strenuously contended, at every step of the way, that given the names of the supposed Government employees, he could produce additional evidence of malice. As the Court of Appeals noted, petitioner's contention was not frivolous (Pet. p. A-9).[1]

This civil suit is governed by the Federal Rules of Civil Procedure. Rule 26(b)(1) provides that "Parties may obtain discovery regarding any matter, *not privileged*, which is relevant to the subject matter involved in the pending action . . ." (Italics supplied).

Accordingly, if the decisions below did not turn petitioner out of Court based upon a sustention of respondents' claim of a First Amendment privilege, then his complaint has been dismissed without affording him the discovery that must be given, as a matter of right, to every party in a civil suit. Aside from questions of due process and equal protection of laws that may arise, this patent violation of the Rules would constitute such plain error as to call for summary reversal.

The same is true of respondents' circuitous contention that the facts make it unnecessary to pass on the constitutional question of privilege. In effect, respondents say: We have made a showing of a good faith belief in the truth of the complained-of libels; hence, it is quite all right

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[1] Indeed, suppose from their depositions it is discovered that Walsh's alleged Government sources told him that it was an *un*reliable informer who reported that petitioner was bartender for mobsters, or, that other reports showed that petitioner was not at the Sansone home. Nothing short of Walsh's confession of knowledge of falsity could conceivably be more relevant to the issue of malice.

if petitioner is denied the right to controvert it through discovery because we divine that what he would discover will be irrelevant; and, since this case is governed by **New York Times** and its progeny, we qualify for the constitutional protection of summary judgment.

Respondents' Question No. 1 points out additional reasons that call for review of the decisions below.

Respondents contend that the Question presented by this case is whether they were entitled to summary judgment based upon their showing of lack of malice (Res. Br. p. 2, Ques. No. 1). Of course, built into the Question, as respondents pose it, is the erroneous assumption that it was proper to deprive petitioner of the discovery that might lead to evidence of malice. Aside from that, petitioner will demonstrate that the entry of summary judgment, based even upon the deprived record, is in harsh conflict with settled principles of defamation law and the Rules governing summary judgment.

Summary judgment should have been denied because the defamatory insurance story was published with malice.

To support the libel that Michaels and petitioner had a lucrative insurance business relationship, respondents rely upon their "documents 3, 4 and 6" (Res. Br. at top of p. 6). These documents are nothing more than Pikey's notes of the official record of Michaels' 1962 license renewal application and the Stegeman-Heckman letter. Petitioner contends that they did not justify publication of this libel. Assuming, arguendo, that these public records may have been ambiguous, the holding in **Time, Inc. v. Pape**, 401 U.S. 279 (1971), might be said to control if their interpretation was the only question involved. But there is far more that respondents understandably choose to ignore.

The material concerning this defamation has been capsuled in the Petition, pp. 5-7, and need not be repeated. Respondents learned that the insurance story was false from the very public officials who were charged with the responsibility of knowing the meaning of the records of the Department of Insurance of which they were the heads.[2] *Both men told Pikey that those records showed that Michaels had not brokered insurance through Cervantes.* Notwithstanding this knowledge of falsity, and lacking any basis whatsoever to do so, respondents willfully aggravated this libel by informing their readers that this nonexistent business tie was a lucrative one for petitioner.

We submit that the insurance story meets the malice requirement of **New York Times**, particularly if viewed in the light most favorable to petitioner, as it must be. **Adickes v. Kress**, 398 U.S. 144 (1970). **Vandenburg v. Newsweek, Inc.**, 441 F.2d 378 (5th Cir. 1971).

Summary judgment should have been denied because the defamatory bartender story was published with malice.

What has been said in the Petition, pp. 7-9, concerning the part of the article that made petitioner into a bartender for the elite of the underworld is not disputed and need not be repeated. The hard fact is that this defamation was based upon one report from an unknown informer—nothing more. When that is set against the volume of countervailing facts known by Walsh before publication, it must surely have created substantial doubt.[3] No wonder

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[2] Mr. Stegeman was head of the Brokers Division of the Department of Insurance. He wrote the letter that Mr. Heckman answered. Mr. Clay was head of the entire Division of Insurance. It was by virtue of his decision that Michaels' renewal application was denied.

[3] During his deposition, when Walsh was cornered by these facts, he claimed that he called his "people" in the Justice Depart-

he held these things back from what respondents call their "editorial process". We submit that the bartender story was published with a reckless disregard for the truth, to say the least; and, under constitutionally required instructions, a jury should be permitted to find that it was published with malice.

With respect to the remaining two libels, proof that Walsh maliciously fabricated will be produced when petitioner learns the identity of his claimed Government sources, who all too conveniently allegedly spoke to the guts of those libels whenever a purloined report was silent.

The courts below failed to recognize that when an article contains a libelous statement, it makes no difference if the bulk of the article was true.

The courts below did not follow settled principles of libel law which make it clear that a false matter is nonetheless libelous for having appeared in the same article with truthful statements. Afro-American Publishing Co. v. Jaffe, 366 F.2d 649, 655 (C.A. D.C., En Banc, 1966); and it is no defense to an action for defamation to prove some other or different kind of misconduct. Restatement, Torts, § 582, Comment (e).

Instead of applying these established principles, the courts below accepted respondents' invitation to focus upon the article as a whole in order to determine whether the paragraphs of which petitioner complained were

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ment, three years after the informer made his report, and they told him he was reliable. Significantly, three years before, when the St. Louis Globe-Democrat newspaper rejected the same story from Walsh because of serious doubts as to its truth, he did not call his "people" then. Remarkably, respondents have continued their silence concerning this. Of course, if they were to mention it, they would logically be required to justify the denial of petitioner's right to controvert it through the discovery provided in the Rules.

published with malice. Respondents successfully convinced those courts that the care and time spent in gathering and reviewing the material upon which the entire article was published supported their belief in its truth; and the 4 paragraphs of which petitioner complained were only a relatively minor and unimportant part of that vast enterprise which resulted in an article of 87 paragraphs; and, in addition, since petitioner complained of but 4 paragraphs, he either admitted or failed to deny the truth of the other 83. Indeed, as respondents state, the District Court actually said: "the four paragraphs complained of here have little or no impact on the total article. In context, the four paragraphs are a minute and relatively ineffective portion of the article as a whole" (Pet. p. A-23). As respondents correctly point out, the Court of Appeals adopted a similar view in affirming the action of the District Court (Pet. pp. A-7, A-8).[4]

Petitioner unsuccessfully urged the courts below that respondents' malice should be determined from their knowledge of falsity or reckless disregard with respect

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[4] The Court of Appeals stated: "Yet in the face of this massive attack . . . the mayor takes issue with but 4 of the 87 paragraphs comprising the article. So far as the vast amount of the other material is concerned, its truth is either admitted or not explicitly denied. Thus, we are concerned here with *only the comparatively few words* said by the mayor to be false and defamatory . . ." (Pet. pp. A-7, A-8) (Italics supplied).

. . . . . .

". . . it was over a period of many months that Life's reporter carefully collected and documented the data on the basis of which *the article* was written and published. . . . Life's key personnel . . . spent countless hours corroborating and evaluating *this data*. Once suit was instituted, the mayor was provided with *hundreds of documents utilized in preparation of the article*" (Pet. pp. A-13, A-14) (Italics supplied).

The paragraph concerning the insurance story is based upon two documents which petitioner produced. The bartender story and the other two defamations are based upon one document each, not hundreds of documents.

to each of the 4 defamations complained of with the judicial inquiry focused upon the malice stemming from each libel, undiluted and uninfluenced by a belief that malice may be absent with respect to the rest of the article.

For the convenience of the Court, we have annexed hereto, as Appendix A, some excerpts from petitioner's brief filed in the Court of Appeals. The authorities cited there show that the courts below labored under the misconception that the other 83 paragraphs constituted a defense to the 4 paragraphs complained about.

Respondents' "*corroboration* theory" does not cancel their malice in publishing the insurance and bartender stories.

Respondents' "*corroboration* theory" played a major role in beguiling the courts below to write off the insurance and bartender stories.

The theory begins with the specious claim that since petitioner complained of but 4 paragraphs, he admitted, or failed to deny, the other 83. Significantly, both of the courts below thought that to be of such import as to require its recitation in their opinions. As we have already mentioned, it exemplifies that erroneous concepts of libel law were applied since those 83 paragraphs, even if true, would not excuse the libels complained about. By actual count, 54 of those paragraphs concerned Mr. Shenker exclusively and the rest dealt with matters that were just as disconnected from the insurance and bartender stories. How can they possibly be said to corroborate them?[5]

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[5] The 4 complained-of libels are the only ones wherein petitioner was alleged to have a business and personal tie with the underworld through consortium with a known and recognized criminal (Michaels).

Moreover, when and where was petitioner supposed to deny them in filing a "short and plain statement of the claim" pursuant to Rule 8(a)(2) Fed.R.Civ.Pr. Respondents have arrogated to their article the qualities of a pleading that needs to be answered paragraph by paragraph.

The corroboration theory is also propped up by respondents' expertise in the technique of guilt by accusation. Most of what was said about Sansone, organized crime in St. Louis and the St. Louis Crime Commission was utterly ridiculous and would be shown to be such at a full-blown trial. Those matters find no place in the procedure for resisting summary judgment based solely on malice and their injection into the case, at that stage, would have involved the Court in an impossible trial by paper.

Another facet of the corroboration theory is respondents' expertise in the technique of guilt by association. Admittedly, Sansone is the son-in-law of Michaels. According to respondents, Michaels' reputation was transferred to Sansone and from him it went to petitioner; and Shenker's guilt by accusation became petitioner's guilt by appointment.[6]

Lastly, respondents point to their "editorial process" as the corroborator of the 4 relevant libels. This process

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[6] This is what petitioner knew about Mr. Shenker when he appointed him Chairman of the St. Louis Crime Commission:

> He had served on the Board of Directors of a host of Jewish, Catholic and Protestant charities too numerous to mention. In 1964, he received the Human Relations Award of St. Louis University. He was the recipient of the Distinguished Alumnae Award of Washington University in 1967 and the Award of Honor by the Lawyers Association of St. Louis in 1966. He had been a delegate to four national Democratic conventions; had served as President of the National Association of Defense Lawyers; and was a member of the Council of Criminal Law Section of the American Bar Association.

was nothing more than a perfunctory sham. It was concerned exclusively with the choice of words—the rhetoric of the article and nothing else. No one checked, corroborated or verified the "facts" as related by Walsh. They were accepted without question during the process of selecting the words that would be used to put them into print.

For convenience, we have annexed hereto, as Appendix B, excerpts from petitioner's brief filed in the Court of Appeals, citing references to the Appendix showing beyond doubt that the editorial process neither investigated, verified, or corroborated the complained-of defamations or even a single sentence of the entire eight-page article.

"Investigative report" versus "hot news"

Respondents slough off the second question presented by the Petition as a negligence argument that would penalize a publisher for investigating. According to respondents, if "plaintiff doubts that Life conducted such an investigation, then it is this 'falsehood' on which Life should be challenged" (Res. Br. p. 9 and note at p. 9). Respondents have missed the point. Petitioner's second question goes to the propriety of endowing the publisher of a self-proclaimed investigative report with the same latitude for inaccuracy that is given to the publisher of "hot news".

Of course, no publisher should be penalized for investigating. The question, however, is whether some responsibility should attach when a publisher proclaims in his defamatory article that he has done so. In this case, Life voluntarily trumpeted at every turn that it had conducted a year-long investigation. Thus, Life took it upon itself to maximize its credibility. We suggest that holding Life to its word is not precluded by the First Amendment.

CONCLUSION

The answer to the Question posed in respondents' opposing brief shows the presence of a factual issue of malice and summary judgment should have been denied. In granting summary judgment, the decisions below proceeded upon a misconception of libel law that so seriously wrenches settled principles as to require review by this Court. Moreover, the showing of a factual issue of malice met the very conditions set out in the Opinion for overriding the newsman's privilege it erected, and disclosure of sources should have been ordered. If the denial to petitioner of the right to discovery was not done pursuant to a newsman's privilege, then plain error was committed calling for summary reversal.

Therefore, for the reasons stated both in the Petition and this Reply, review is warranted by this Court.

Respectfully submitted

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December 18, 1972.

Certificate of Service

I hereby certify that on this 18th day of December, 1972, three copies of Petitioner's Reply Brief were delivered to Mr. Robert S. Allen, c/o Lewis, Rice, Tucker, Allen and Chubb, Counsel for Respondent Time, Inc., 611 Olive Street, St. Louis, Missouri 63101; and to Mr. D. Jeff Lance, Counsel for Respondent Denny Walsh, 611 Olive Street, St. Louis, Missouri 63101. I further certify that all parties required to be served have been served.

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APPENDIX A

I

The Opinion Erroneously Required Plaintiff to Prove the Entire Article Was Published With Malice When He Needed to Show a Factual Issue of Malice Only With Respect to Any One of the Pleaded Libels.

In general, when specific words within an article are claimed to be defamatory, courts will look to the entire publication to find the meaning of those words in the context in which they were used. However, once it is determined that the complained-of words were defamatory, then the judicial inquiry is focused upon the publisher's good faith belief in their truth to determine whether those words were published with malice. This is so because if any part of an article is defamatory, it would make no difference if all the rest was published with exemplary care and was true.

In this case, it is conceded that the 4 defamations of which the Mayor complains each constitute a libel per se if published with malice. Accordingly, only the defendants' knowledge of the truth or falsity of each defamatory statement is relevant here.

However, the Opinion found an absence of malice by mistakenly addressing itself to the article as a whole, as though it was to be viewed in its entirety, in order to decide if there was malice with respect to the 4 defamations complained of.

* * * * * * *

We respectfully suggest that the Opinion would have cast this case in a vastly more accurate light if it had recognized that 4 separate libels were complained of; and then examined each for malice, separate and apart from the rest of the article.

The authorities are in unanimous accord that when an article contains a libelous statement it makes no difference if the bulk of the article was true or prepared with meticulous care. In short, even if the other 83 paragraphs were true, and even if the most exacting standards of investigation and corroboration were used in their preparation, that still would not constitute a defense, nor would it increase plaintiff's burden one iota with respect to any of the 4 libels complained of. What was stated more than half a century ago in **Meriwether v. Publishers: George Knapp & Co.**, 97 S.W. 257, 269 (Mo. 1906), is representative of the present day black letter rule:

> "In a publication, if a number of truths should be stated about a named individual which would be libelous if untrue, and in the same article a false and slanderous statement about the person should appear, we cannot see upon what ground he could be denied the right to recover on account of the publication of the false and slanderous matter. The false matter would be nonetheless libelous for having appeared in the same article with the truthful statements."

See, also, **Restatement of Torts**, § 582, Comment (e), declaring that it is no defense to an action for defamation "to prove some other substantially different kind of misconduct even though it is equally or more reprehensible. Thus, a charge of burglary against one is not justified by proof that he has committed a murder."

In Hanson, Libel and Related Torts, Vol. 1, § 99 at page 82, it is stated:

> "Nor can specific charges be defended by showing either a different misdeed or general disrepute." (Citing cases).

If the rule were otherwise "then a publisher of a newspaper may publish a libel of whom he will, and escape

liability by appending a modicum of truth to the article." **Meriwether**, *supra*, at p. 269. For a recent holding to the same effect, see **Afro-American Publishing Co. v. Jaffe**, 366 F.2d 649, 655 (CA D.C. Cir., En Banc, 1966), where it is stated:

> "The article contained other items that were true, but in the setting already described these only reenforced the defamatory impression. Partial truths are not necessarily even mitigating in this branch of the law, for the defamer may be the more successful when he baits the hook with truth."

. . . . . .

Plaintiff must respectfully insist that a different result will be reached when the defendants' malice is examined within the perimeter of their knowledge of falsity with respect to each of the 4 defamations. That is to say, the Opinion should have focused upon the malice stemming out of each of those libels, undiluted and uninfluenced by the belief that there was an absence of malice with respect to the other 83 paragraphs.

APPENDIX B

Paragraph 31 of the article (repeated in the press release) charges plaintiff with acting as bartender for the royalty of the underworld. Here is how the editorial process functioned respecting that libel:

Mr. Flaherty testified: He did not know the story was based on an informer's report (A. 290); or that the Mayor denied being there (A. 291); or that Sansone denied that the Mayor was there (A. 292); or that the Globe-Democrat had refused to publish the same story (A. 292-293); or that the same informer's report put Mr. Stanley Musial there and Mr. Musial denied it (A. 293). He did not know that Life had Ralph Salerno check and he verified that the Mayor was in his office that morning (A. 295-296).

Mr. Harry Johnston, a lawyer for Time, Inc., who screened the article with the law of defamation in mind, testified: He did not know that the Globe-Democrat had refused to publish the same story (A. 347), or that both the Mayor and Sansone vehemently denied that the Mayor was there (A. 348), or that the same report also placed Mr. Musial at this get-together and he denied his presence (Johnston Depo. p. 93). But Mr. Johnston would not stultify himself. **He also testified that, if he had known these things he would have had doubt as to the truth of paragraph 31** (A. 360). *But Walsh knew them.*

Mr. Sackett did not know that Walsh had never talked to anyone who claimed to have seen the Mayor at the get-together (A. 429). Moreover, he did not cause the article to be checked for accuracy, stating: "I am an editor. I am not a reporter" (A. 437).

Turning to the "editorial process" in connection with the publication of paragraph 27 wherein it is alleged that

Michaels brokered insurance for the Cervantes firm, **Managing Editor Graves admitted that if he had known that Michaels' application for renewal of his broker's license did not state that he had brokered insurance with the** Cervantes firm, **he would not have approved paragraph 27** (A. 254, 258). *But Walsh knew it and Pikey knew it* and lawyer Johnston knew it when he was shown a copy of the applications (A. 318-319).

Mr. Flaherty testified that he relied on Walsh (A. 253) and, if he had known the truth about Michaels' applications for renewal of his broker's license, **he would not have approved paragraph 27** (A. 253-254).

Remarkably, neither Flaherty, Sackett nor Johnston knew of the Stegeman-Heckman correspondence until **after** the article was published (A. 254-255, 455, 326-328). But attorney Johnston, as we would expect a lawyer to be, was honest enough to admit that the Stegeman-Heckman correspondence indicated to him that Michaels had **not** written insurance with Cervantes and, had he known of it, **he would not have approved paragraph 27** (A. 334-335). *But Walsh and Pikey knew all about the correspondence.* In fact, Pikey had been told in no uncertain terms by both Mr. Stegeman and Mr. Clay that the Stegeman-Heckman exchange meant that Michaels had **not** brokered insurance with Cervantes.

Counsel for the defendants have stipulated that Mr. Levitt did not have any more knowledge than Mr. Flaherty; and that Mr. Perle, another of Life's lawyers, did not have any more knowledge than lawyer Harry Johnston. For that reason, their depositions were not taken (A. 411-415).